

**United States Department of Labor
Employees' Compensation Appeals Board**

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tacoma, WA, Employer**

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**Docket No. 12-1587
Issued: July 2, 2013**

Appearances:

Howard L. Graham, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2012 appellant, through his attorney, filed an appeal from a February 24, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish disability compensation for a total of 54 hours during the period December 14, 2009 through February 6, 2010.

On appeal, appellant's attorney asserts that there was both a change in the nature and extent of the injury-related condition and in the nature and extent of the light-duty job requirements and further asserts that the opinion of appellant's physician should be credited, that OWCP referral physician was not qualified because he had been expelled from the American

¹ 5 U.S.C. §§ 8101-8193.

Neurological Association in 2005 for unprofessional conduct and that his report was not well rationalized. Finally, the attorney asserted that OWCP used an incorrect legal standard in determining causation.

FACTUAL HISTORY

On October 29, 2009 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim, asserting that on October 28, 2009 he pinched a nerve while reaching and pulling on a tightly closed mailbox. He received continuation of pay for the period October 28 through December 11, 2009.²

In an October 27, 2009 report, Dr. Bruce G. MacDonald, Board-certified in family medicine, noted a history that appellant was seen for right shoulder and arm pain that had occurred over the past two days. He noted palpable tightness to the trapezius on the right and diagnosed brachial neuritis. Dr. MacDonald advised that appellant could not work. In an October 29, 2009 report, Dr. Mario G. Alinea, also a Board-certified family physician, noted a history that over the last month appellant had increasing pain in the neck and right arm with finger numbness, which he attributed to constantly reaching and stretching while delivering mail from his truck. He reported right trapezius tenderness and diagnosed sprain of the neck and brachial plexus lesions. Dr. Alinea also advised that appellant could not work.

Appellant was evaluated by Dr. Solomon Kamson, Board-certified in anesthesiology and pain management, on November 9, 2009. Dr. Kamson noted that appellant was being seen for an October 27, 2009 employment injury, provided physical examination findings and diagnosed cervical radiculopathy, cervical spondylosis, thoracic spine pain and brachial neuritis. In a November 11, 2009 magnetic resonance imaging (MRI) scan study of the cervical spine demonstrated disc osteophyte complex at C3-4, C6-7 and C7-T1. On December 4, 2009 Dr. Kamson additionally noted that appellant had parascapular pain on the right, muscle spasms, tenderness and decreased range of motion. On November 21 and December 5, 2009 he performed cervical/thoracic epidural steroid injections.

Appellant filed a claim for compensation for the period December 14 to 18, 2009. At that time, the employing establishment stated that he submitted no medical evidence to justify compensation. By letter dated December 30, 2009, OWCP informed appellant of the type of evidence needed to formally adjudicate his claim, noting that the evidence of record was insufficient to establish entitlement.

In a duty status report dated December 4, 2009, received by OWCP on January 25, 2010, Dr. Kamson advised that appellant could work six hours a day within restrictions. He diagnosed cervical radiculopathy and a herniated cervical disc. A December 8, 2009 electrodiagnostic study of the right upper extremity demonstrated evidence consistent with acute C7-8 radiculopathy and mild ulnar neuropathy at the wrist. A brachial plexus lesion could not be ruled

² Appellant has additional accepted claims. OWCP file numbers xxxxxx074 and xxxxxx068 are accepted for bilateral fibromatosis and file number xxxxxx523 is accepted for a neck sprain that occurred on October 13, 2004 while moving mail bins. The instant is adjudicated under file number xxxxxx547.

out. On January 9, 2010 Dr. Kamson advised that appellant could work six hours of restricted duty due to brachial neuritis or radiculitis with cervical and thoracic clinical findings.

Appellant accepted a modified carrier position on January 28, 2010. He was to work from 9:00 a.m. to 3:00 p.m., answering the telephone and performing customer service and administrative duties. Standing and walking were limited to four hours continuous, six hours intermittent; simple grasping to six hours; no fine manipulation; and lifting limited to 10 pounds continuous, 12 pounds intermittent. Appellant filed claims for two hours of daily compensation, beginning January 9, 2010.

Following an initial denial dated February 3, 2010, subsequently, in a February 8, 2010 decision, OWCP accepted that appellant sustained a thoracic strain and right shoulder strain on October 27, 2009. In reports dated January 19 and 29, 2010, Dr. Kamson diagnosed cervical radiculopathy, cervical spondylosis, cervicgia, shoulder pain and brachial neuritis and continued to advise that appellant could work six hours of modified duty daily. In a January 28, 2010 letter, he reported the history of injury and advised that, based on appellant's clinical presentation, objective physical findings and radiological findings, his diagnoses of cervical radiculopathy due to right C6-7 and C7-T1 stenosis with intraforaminal disc protrusion, thoracic strain and right shoulder sprain/strain were findings that occurred after the October 27, 2009 incident. Dr. Kamson stated that the thoracic strain was a temporary condition manifested by myofascial pain. On February 12, 2010 he released appellant to eight hours of modified duty. Appellant accepted an eight-hour position answering telephones and performing customer service and administrative duties on February 22, 2010.

A February 26, 2010 MRI scan study of the thoracic spine demonstrated disc osteophytes at T6-7 and T7-8. A right shoulder MRI scan that day demonstrated rotator cuff tendinopathy without full thickness tear, long head of the biceps brachii tendinopathy, subcoracoid bursitis and a slight increased signal in the vicinity of the anterosuperior labrum. Dr. Kamson performed an additional epidural injection on March 13, 2010. On March 14, 2010 he advised that appellant continued to have residuals of the accepted right shoulder strain and thoracic strain, based on the February 26, 2010 MRI scan studies. Dr. Kamson concluded that these conditions were not preexisting.

In an undated statement, James Haslett, supervisor of customer service, advised that based on the restrictions provided, there was no work available for the period December 16 to 30, 2009. He noted that appellant returned to work on January 2, 2010.

In March 2010, OWCP referred appellant to Dr. L. David Rutberg, a Board-certified neurosurgeon. In an April 15, 2010 report, Dr. Rutberg noted the history of injury, his review of the statement of accepted facts and medical record and appellant's complaints of aching in the right shoulder. He noted that appellant's right shoulder was taped and that he had nonanatomic hypesthesias over the chest and face. Examination of the cervical, thoracic and lower spine was unremarkable except for tenderness over the trapezial area on the right with no spasm and 5/5 muscle strength in the upper and lower extremities. Dr. Rutberg advised that throughout the examination there seemed to be symptom magnification. He reviewed CD's of the imaging studies and diagnosed sprain of the thoracic spine, sprain of the right shoulder, minimal degenerative disc disease and facet disease of the cervical spine, opining that this was on a wear-

and-tear-disease-of-life basis and not in any way exacerbated by the October 27, 2009 work injury. Dr. Rutberg also diagnosed degenerative changes of the right shoulder and thoracic area, more probably than not a disease of life with no association or exacerbation by the October 27, 2009 employment injury. He concluded that there were no residuals of the accepted thoracic sprain and right shoulder strain and that appellant had no work restrictions. In an attached work capacity evaluation, Dr. Rutberg advised that appellant could work eight hours a day with eight hours of sitting and twisting. Walking, standing, reaching, reaching above shoulder, bending, stooping repetitive movements of the wrists and elbow, pushing, pulling, lifting were limited to four hours daily; operating a motor vehicle at work to six hours daily; operating a motor vehicle to and from work to three hours daily; and squatting, kneeling and climbing to two hours daily, with a 35-pound weight restriction. Appellant was to be given 10 minute breaks every two to three hours.

The record also contains evidence regarding a November 2, 2002 motor vehicle accident and follow-up care in which appellant sustained a neck and arm strain.

By decision dated May 4, 2010, OWCP denied appellant's claim for 54 hours of monetary compensation for the period December 14, 2009 to February 6, 2010 on the grounds that the medical evidence did not support that disability was due to the accepted conditions.³

On May 27, 2010 appellant requested a hearing and submitted additional evidence. In a June 7, 2010 statement, he asserted that previous claims for neck conditions, adjudicated under file numbers xxxxxx523 and xxxxxx525, should be combined with the instant claim and that the wrong legal standard was used in determining causation. In a December 11, 2009 treatment note, Dr. Kamson reiterated his diagnosis of brachial neuritis or radiculitis. In reports dated April 30, May 24 and June 21, 2010, he advised that appellant could work eight hours a day with restrictions to his physical activities. In a June 21, 2010 treatment note, Dr. Kamson stated that he did not concur with the "[Independent Medical Evaluation] IME" report and was of the opinion that appellant's condition was not yet fixed and stable. He provided physical examination findings and diagnosed cervicalgia, brachial neuritis or radiculitis and thoracic or lumbosacral neuritis or radiculitis.

On June 10, 2010 Mr. Haslett again advised that no light duty was available for appellant from December 14, 2009 to January 2, 2010.

At the hearing, held on October 21, 2010, appellant described the October 27, 2009 injury and reiterated his argument that his neck claims should be combined and that the wrong legal standard was used in determining causation. In an October 4, 2010 treatment note, submitted after the hearing, Dr. Kamson reiterated his findings and conclusions. In November 19, 2010 correspondence, appellant asserted that his condition had changed drastically following the October 27, 2009 injury.

³ The decision contained a chart for all periods claimed through April 9, 2010, which included intermittent compensation that had been paid. In an April 30, 2010 decision, OWCP denied appellant's claim for 1.50 hours on March 8, 2010 and 3.15 hours on March 12, 2010 because medical evidence did not support the claim. Appellant did not appeal that decision.

By decision dated January 7, 2011, OWCP's hearing representative found that the medical evidence did not support the claimed intermittent disability beginning December 14, 2009 and affirmed the May 4, 2010 decision.

On December 15, 2011 appellant, through his attorney, requested reconsideration. Counsel asserted that no work was available for appellant within his restrictions for the period December 16 to 31, 2009, and that the January 28, 2010 modified job offer was for only six hours a day. He further asserted that appellant's cervical conditions should be accepted, that the statement of accepted facts provided Dr. Rutberg was incomplete because it omitted additional accepted conditions, that his opinion was equivocal and not rationalized, and that OWCP applied an incorrect legal standard regarding causation. Counsel further noted that in 2005 Dr. Rutberg had been expelled from his professional association for unprofessional conduct.

In a November 6, 2010 treatment note, Dr. Kamson reiterated his findings and conclusions, noting that appellant continued to have residuals of his employment injury and could not resume unrestricted work. On May 9, 2011 he indicated that appellant had resumed full duty. In an August 7, 2010 duty status report, Dr. Kamson advised that appellant's condition was unchanged. He provided physical restrictions and advised that appellant should avoid weight on the shoulder. In an August 17, 2011 report, Dr. Archie Adams, a Board-certified family physician, advised that appellant was injured on August 13, 2011 while closing a mail truck door. He diagnosed neck, thoracic and lumbar sprains and provided physical restrictions. On August 24, 2011 Dr. Alinea noted a complaint of neck and right arm pain and thoracic pain. He provided physical examination findings and diagnosed neck, thoracic and lumbar sprains and attached a duty status report with physical restrictions.

In a merit decision dated February 24, 2012, OWCP denied modification of the prior decisions. It disagreed with appellant's arguments on appeal and found that the medical evidence did not support that intermittent disability from December 14, 2009 to February 6, 2010 was causally related to the accepted work conditions.

LEGAL PRECEDENT

Under FECA the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA⁵ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁶ Whether a particular injury causes an employee to be disabled

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ *Donald E. Ewals*, 51 ECAB 428 (2000).

for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.⁹

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁰ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹²

ANALYSIS

The Board finds this case is not in posture for decision. OWCP accepted that on October 28, 2009 appellant sustained a thoracic strain and right shoulder strain. Appellant is claiming wage loss for 54 hours during the period December 14, 2009 to February 6, 2010.

Although OWCP referred appellant to Dr. Rutberg in March 2010 for a second-opinion evaluation, it did not ask him to comment on the period of claimed disability. While it requested him to evaluate appellant's condition relevant to his accepted condition, OWCP failed to request Dr. Rutberg's opinion as to appellant's disability status during the specific period from December 9, 2009 to February 6, 2010. Dr. Rutberg's April 15, 2010 report is therefore irrelevant to the merit issue in this case. It should be noted, however, that he found tenderness over the right trapezius area on physical examination.

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, OWCP shares

⁷ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

⁸ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

¹⁰ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹² *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

responsibility in the development of the evidence.¹³ Once OWCP undertakes development of the record it must do a complete job procuring medical evidence that will resolve the relevant issues in the case.¹⁴ The case shall therefore be remanded to OWCP. On remand, OWCP shall request that Dr. Rutberg provide an opinion as to whether appellant had any physical restrictions due to the accepted conditions for the specific period of disability claimed. Regarding appellant's assertion on appeal that Dr. Rutberg's opinion should not be credited because he was expelled from a professional association in 2005, he is Board-certified in neurosurgery, and there is no indication that he was not licensed to practice medicine at the time of the 2010 examination. Due to the Board's posture in this decision, appellant's further arguments on appeal need not be addressed.

On remand, OWCP should also adjudicate appellant's entitlement to wage loss for attending appropriate medical treatment.¹⁵ After this and such further development deemed necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant established that he was entitled to monetary compensation during the period December 14, 2009 through February 6, 2010, due to the accepted conditions.

¹³ See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁴ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

¹⁵ 5 U.S.C. § 8105. Any leave used cannot be compensated until it is converted to leave without pay. For a routine medical appointment, a maximum of four hours of compensation is usually allowed. See *William A. Archer*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: July 2, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board